LAY HONG FOOD CORPORATION SDN BHD v. TIONG NAM LOGISTICS SOLUTIONS SDN BHD

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1182-06-2016]
18 MAY 2017

CONTRACT: *Damages – Breach – Contract for transportation and cold room storage facilities – Loss of profit – Claim for – Failure to produce primary documents to prove facts and amount as to loss of profit – Failure to call maker of summary of billings to explain basis of calculation of amount claimed – Whether real or factual evidence must be adduced – Whether mere summaries or general estimations insufficient – Loss of rental for trucks – Failure of defendant to make payments for road tax and insurance – Whether trucks could have been utilised without change of ownership effected – Whether plaintiff suffered loss of rental because trucks were not usable – Whether Judicial Commissioner failed to analyse all facts and evidence – Whether Judicial Commissioner erred in allowing claims*

CONTRACT: *Termination – Notice of termination – Failure to issue six months' notice – Date of notice of termination a month before contract expired – Whether legally impossible to give requisite six months' notice – Whether contract itself expired before six months' notice of termination took effect – Whether claim for damages unsustainable*

LIMITATION: *Accrual of cause of action – Acknowledgment of debt – Whether there was acknowledgment that there was subsisting debt – Whether acknowledgment must be unequivocal – Whether claim for recovery of debt time barred – Limitation Act 1953, ss. 26(2) & 27*

The defendant entered into contracts for transportation and cold room storage facilities with the plaintiff (TN Logistics) and its subsidiary Tiong Nam Coldrooms and Distribution Centre Sdn Bhd ('TN Coldrooms'). The claim by the plaintiff in the High Court against the defendant was for the following: (i) the invoice claims in the sum of RM1,683,850.38; (ii) the loss of profits' claim in the sum of RM1,555,675.14; and (iii) the trucks claim for the loss of rental in the sum of RM470,500. After a full trial, the Judicial Commissioner ('JC') allowed all the three claims. Dissatisfied, the defendant appealed to the Court of Appeal. It was submitted by the defendant that they were disputing the first claim *ie* the invoice claim on the basis that part of it was time barred. The defendant disputed part of the invoice which were the pre-October 2007 invoices amounting to RM274,540. According to the defendant, the present suit was filed in October 2013, hence, it would follow that the claims on invoices before October 2007 would be caught by limitation. On the second and third claims *ie* the loss of profits claim and the trucks claim for the loss of rental, the defendant submitted that there had

A been no analysis and judicial evaluation of the facts and the evidence in respect of these claims at all. Hence, it warranted appellate intervention by this court. On the point of limitation, the plaintiff sought to rely on a cheque issued by the defendant dated 6 April 2009 which was payment to the plaintiff for certain transactions. The plaintiff submitted that such partial B payments fell within the ambit of s. 26(2) of the Limitation Act 1953 which stipulates that a cause of action may freshly accrue at the time the debtor acknowledges the claim or when the debtor makes any payment in respect of the debt. According to the plaintiff, the defendant had made these partial payments on 6 April 2009 which amounted to an acknowledgement of debt C on the part of the defendant, therefore, the plaintiff's action which was filed on 4 October 2013 was well within the six year limitation period and thus was not time barred. As for the second and third claims, the plaintiff submitted that when the plaintiff provided the services to the defendant, the relationship between the plaintiff and the defendant for the said period was governed by the terms and conditions. The plaintiff further argued that the D defendant failed to give the six months' advance notice to terminate the contract and as a result, the plaintiff had suffered losses.

Held (allowing appeal with costs; setting aside orders of the High Court) Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

E **(1)** The plaintiff did not plead the exception under s. 26(2) of the Limitation Act 1953 as regards the alleged acknowledgment of the debt. It is a requirement to plead the fact of the acknowledgment of debt in order to revive the cause of action. As an essential element of acknowledgment of debt (as a defence to limitation), the acknowledgment must be F unequivocal. There must be evidence of an acknowledgment by the defendant that they were indebted to the plaintiff and quantified in figures (s. 27 of the Limitation Act 1953). The plaintiff failed to show any documentary evidence, where the language used by the defendant could amount to an unequivocal admission of a subsisting debt. (paras 27-31)

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(2) The defendant did issue a cheque dated 6 April 2009. However, no evidence was led by the plaintiff to show the purpose of the cheque payment. There was nothing in the notes of proceedings to show that the plaintiff had referred to any of the defendant's witness, the cheque which H was allegedly for part payment of the debt in question. Hence, the acknowledgment of the debt exception raised by the plaintiff to the defence of limitation by the defendant was clearly unsustainable as the plaintiff failed to plead the fact of such exception and there was no evidence to show that the cheque payment by the defendant was towards any particular invoice/transaction. As such, it failed to meet the test of I an unequivocal acknowledgment of the debt. Therefore, the invoice claim of RM274,540 was clearly time barred and should be deducted from the total claim. (paras 32-34)

(3) On the second claim, in making its claim for loss of profits, the plaintiff had produced a sheet of paper in the sum of RM1,555,675.14 which was unsigned. There were no primary documents or audited accounts produced by the plaintiff to prove the facts and the amount of the stated sum as loss of profits. The facts as stated in the summary of billings were mere statements and it could not be taken as proving that the statements were correct. It had to be proved by calling the maker to explain the facts and the basis of the calculation of the amount which was being claimed. No evidence of the basis of the summary of the billings was adduced herein. In proving damages, real or factual evidence must be adduced as opposed to mere summaries or general estimations and conclusions before a party could succeed in its claim. The JC in her grounds did not give any indication as to how she had arrived at the result when she allowed the second claim of the plaintiff. Therefore, the JC had come to an erroneous finding on the loss of profits claim. (paras 49-56)

(4) As for the third claim, it was alleged by the plaintiff that due to the failure of the defendant to make payments for road tax, insurance and fees for inspection, the plaintiff was unable to use the trucks until the date when the ownership of the trucks were transferred to the plaintiff. Hence, the total amount of loss which the plaintiff claimed as total loss of profits was in the amount of RM470,500. However, there was no evidence of such loss as the road tax and the insurance could have been renewed and the trucks could have been utilised without the change of ownership effected. The plaintiff failed to prove that the trucks were not usable or that it had suffered any loss of rental because they were not usable. Clearly, the JC erred in allowing the claim for the trucks *ie* the loss of rental, when she did not analyse at all the facts and the evidence in arriving at her decision. (paras 62, 75 & 80)

(5) The plaintiff alleged that the defendant failed to issue the six months' notice of termination period as was required under the contract. The contract, however, would have expired by 22 April 2009. The defendant issued the notice of termination on 18 March 2009 to terminate the contract with effect from 6 April 2009. The date of the notice of termination of 18 March 2009 was about a month before the contract expired (22 April 2009). Hence, it was legally impossible for the defendant to give the requisite six months' notice to the plaintiff. Therefore, the claim for damages by the plaintiff, on the basis of the failure by the defendant to give the six months' notice before termination, was clearly unsustainable, as the contract itself expired before the six month notice of termination could take effect. (paras 44-47)

(6) This was not a case where all the evidence of the loss was adduced and there was a wrong calculation of the figures that was before the court. This was a case where the basic evidence was insufficient for any calculation or formula to be devised in order to arrive at a figure where

A the loss can be quantified. To remit the case back to the trial court for reassessment would result in giving the plaintiff a second bite of the cherry, which would cause grave prejudice to the defendant. (para 77)

Bahasa Malaysia *Headnotes*

B Defendan memasuki kontrak pengangkutan dan kemudahan penyimpanan bilik sejuk dengan plaintif (TN Logistics) dan subsidiarinya Tiong Nam Coldrooms and Distribution Centre Sdn Bhd ('TN Coldrooms'). Tuntutan plaintif dalam Mahkamah Tinggi terhadap defendan adalah seperti berikut: (i) tuntutan invois dalam jumlah RM1,683,850.38; (ii) kehilangan
C keuntungan dalam jumlah RM1,555,675.14; dan (iii) tuntutan untuk kehilangan sewa bagi lori-lori dalam jumlah RM470,500. Selepas perbicaraan penuh, Pesuruhjaya Kehakiman ('PK') membenarkan ketiga-tiga tuntutan. Tidak berpuas hati, defendan merayu ke Mahkamah Rayuan. Defendan mempertikaikan tuntutan pertama iaitu tuntutan invois kerana sebahagiannya dilarang had masa. Defendan mempertikaikan sebahagian
D invois iaitu invois sebelum Oktober 2007 berjumlah RM274,540. Menurut defendan, guaman ini difailkan pada Oktober 2013, oleh itu, tuntutan invois sebelum bulan Oktober akan terhalang oleh had masa. Mengenai tuntutan kedua dan ketiga pula, iaitu tuntutan kehilangan keuntungan dan tuntutan kehilangan sewa untuk lori-lori, defendan menghujahkan bahawa tiada
E analisis atau penilaian kehakiman langsung atas fakta dan keterangan berhubungan tuntutan-tuntutan ini. Oleh itu, ia mewajarkan campur tangan rayuan. Berkenaan had masa, plaintif bergantung pada satu cek yang dikeluarkan oleh defendan bertarikh 6 April 2009 iaitu bayaran kepada plaintif bagi transaksi tertentu. Plaintif menghujahkan bayaran sebahagian
F terangkum dalam s. 26(2) Akta Had Masa 1953 yang menetapkan bahawa satu kausa tindakan terakru apabila penghutang mengakui tuntutan atau apabila penghutang membuat bayaran berhubung dengan hutang itu. Menurut plaintif, defendan telah membuat bayaran sebahagian itu pada 6 April 2009 yang membentuk pengakuan hutang oleh defendan, oleh itu,
G tindakan plaintif yang difailkan pada 4 Oktober 2013 adalah dalam tempoh had enam tahun dan dengan itu masa tidak terhad. Bagi tuntutan kedua dan ketiga pula, plaintif menghujahkan bahawa plaintif memberikan perkhidmatan kepada defendan, dan hubungan antara plaintif dan defendan bagi tempoh itu ditadbir oleh terma dan syarat. Plaintif selanjutnya menghujahkan bahawa defendan gagal memberikan notis enam bulan untuk
H penamatan kontrak dan akibatnya, plaintif mengalami kerugian.

Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah-perintah Mahkamah Tinggi)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

I

(1) Plaintif tidak memplidkan pengecualian bawah s. 26(2) Akta Had Masa 1953 berhubung dakwaan pengakuan hutang itu. Adalah satu keperluan untuk memplidkan fakta pengakuan hutang bagi memulihkan kausa

tindakan. Sebagai elemen penting pengakuan hutang (sebagai pembelaan had masa), pengakuan mestilah jelas dan nyata. Perlu ada keterangan pengakuan oleh defendan bahawa ia berhutang pada plaintif dikira dalam angka (s. 27 Akta Had Masa 1953). Plaintif gagal menunjukkan apa-apa keterangan dokumentar, di mana bahasa yang digunakan oleh defendan berjumlah kepada pengakuan yang jelas dan nyata terdapatnya hutang yang sedia ada.

(2) Defendan mengeluarkan cek bertarikh 6 April 2009. Walau bagaimanapun, tiada keterangan dikemukakan oleh plaintif untuk menunjukkan tujuan bayaran cek itu. Tiada nota prosiding untuk menunjukkan bahawa plaintif merujuk pada mana-mana saksi defendan, cek yang didakwa sebagai sebahagian pembayaran hutang yang berkenaan. Oleh itu, pengecualian pengakuan hutang yang dibangkitkan oleh plaintif terhadap pembelaan had masa oleh defendan jelas tidak boleh dikekalkan kerana plaintif gagal memplidkan pengecualian sebegitu dan tiada keterangan menunjukkan bahawa bayaran cek oleh defendan adalah untuk mana-mana invois/transaksi. Oleh itu, terdapat kegagalan memenuhi ujian pengakuan hutang yang jelas dan nyata. Dengan itu, tuntutan invois RM274,540 jelas dilarang had masa dan harus ditolak daripada jumlah tuntutan.

(3) Berkenaan tuntutan kedua, dalam membuat tuntutan kehilangan keuntungan, plaintif mengemukakan sekeping kertas dalam jumlah RM1,555,675.14 yang tidak ditandatangani. Tiada dokumen utama atau akaun teraudit yang dikemukakan plaintif untuk membuktikan fakta-fakta dan jumlah yang dinyatakan sebagai kehilangan keuntungan. Fakta yang dinyatakan dalam ringkasan pengebilan hanya penyataan semata-mata dan tidak boleh diambil sebagai bukti bahawa penyataan-penyataan adalah betul. Ia harus dibuktikan dengan memanggil pembuat dokumen bagi menjelaskan fakta dan asas pengiraan jumlah yang dituntut. Tiada keterangan berkenaan asas ringkasan pengebilan dikemukakan di sini. Dalam membuktikan ganti rugi, keterangan benar atau fakta harus dikemukakan berbanding dengan ringkasan semata-mata atau anggaran umum dan kesimpulan sebelum sesuatu pihak boleh berjaya dalam tuntutannya. PK dalam alasan penghakimannya tidak memberi sebarang petunjuk bagaimana beliau mencapai keputusan membenarkan tuntutan kedua plaintif. Dengan itu, PK terkhilaf dalam dapatannya berkenaan tuntutan kehilangan keuntungan.

(4) Berkenaan tuntutan ketiga, plaintif mendakwa disebabkan kegagalan defendan membuat bayaran cukai jalan, insurans dan bayaran pemeriksaan, plaintif tidak dapat menggunakan lori-lori sehingga tarikh pemilikan lori-lori dipindah milik kepada plaintif. Oleh itu, jumlah keseluruhan kerugian yang plaintif menuntut sebagai jumlah kehilangan keuntungan berjumlah RM470,500. Walau bagaimanapun, tiada keterangan berkenaan kerugian tersebut kerana cukai jalan dan insurans boleh diperbaharui dan lori-lori boleh digunakan tanpa pertukaran pemilikan. Plaintif gagal membuktikan bahawa lori-lori tidak boleh

digunakan atau ia telah mengalami apa-apa kehilangan sewa kerana lori-lori tidak boleh digunakan. Dengan jelasnya, PK terkhilaf dalam membenarkan tuntutan untuk kehilangan sewa lori-lori itu apabila beliau tidak menganalisis segala fakta dan keterangan dalam mencapai keputusannya.

(5) Plaintif mendakwa defendan gagal mengeluarkan notis penamatan tempoh enam bulan seperti yang diperlukan bawah kontrak. Kontrak, walau bagaimanapun, tamat tempohnya pada 22 April 2009. Defendan mengeluarkan notis penamatan pada 18 Mac 2009 untuk menamatkan kontrak berkuat kuasa dari 6 April 2009. Tarikh notis penamatan 18 Mac 2009 adalah sebulan sebelum kontrak tamat (22 April 2009). Oleh itu, adalah mustahil dari segi undang-undang untuk defendan memberikan notis enam bulan yang diperlukan kepada plaintif. Dengan itu, tuntutan ganti rugi oleh plaintif, atas dasar kegagalan defendan memberikan notis enam bulan sebelum penamatan, dengan jelasnya tidak boleh kekal, kerana kontrak itu sendiri tamat tempoh sebelum notis penamatan enam bulan boleh berkuat kuasa.

(6) Ini bukanlah kes di mana semua keterangan kerugian dikemukakan dan terdapat salah pengiraan angka di hadapan mahkamah. Ini adalah kes di mana keterangan asas tidak memadai untuk sebarang pengiraan atau formula direka bagi mencapai angka di mana kerugian boleh diukur. Untuk meremitkan kembali kes kepada mahkamah bicara untuk penilaian semula akan menyebabkan plaintif mendapatkan peluang kedua, dan ini akan memprejudiskan defendan.

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***
Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Halsnad v. Mahabala Rao AIR 1937 Madras 826 ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 CA ***(refd)***
Manilal & Sons (M) Sdn Bhd v. Mahadevan Mahalingam & Anor [1986] 2 CLJ 2; [1986] CLJ (Rep) 26 PC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd [2013] 1 LNS 1269 CA ***(refd)***
Wee Tiang Teng v. Ong Chong Hooi & Anor [1978] 1 LNS 234 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 65
Limitation Act 1953, ss. 26(2), 27

For the appellant - Cyrus Das & YH Beh; M/s Beh & Assocs
For the respondent - Paari Perumal & KA Ch'ng; M/s Chai & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-629-10-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The claim by the plaintiff (respondent herein) in the High Court against the defendant (appellant herein) was for the following:

i) The invoice claims in the sum of RM1,683,850.38;

ii) The loss of profits' claim in the sum of RM1,555,675.14; and

iii) The trucks claim for the loss of rental in the sum of RM470,500.

Those claims arose as a consequence of transportation and cold room facilities provided by the plaintiff and its subsidiary to the defendant.

[2] After a full trial in the High Court, the learned Judicial Commissioner (JC), allowed all the three claims.

[3] Dissatisfied with the decision, the defendant appealed to the Court of Appeal, which is the appeal before us. After hearing submissions from both parties, we allowed the appeal with costs. Herein below are our grounds.

[4] In this judgment, parties will be referred to as they were, in the High Court.

Background

[5] The defendant had entered into contracts for transportation and cold room storage facilities with the plaintiff (TN Logistics) and its subsidiary, Tiong Nam Coldrooms and Distribution Centre Bhd (hereinafter referred to as TN Coldrooms).

[6] Between the years December 2004 and November 2007, the defendant entered into seven contracts for transportation and cold room storage facilities with the plaintiff (TN Logistics) or TN Coldrooms. (See Core Bundle Vol 3 at pp. 415-428 and 459-464).

[7] Out of these seven contracts, five were transportation contracts and two storage contracts. The five transportation contracts were separately with TN Coldrooms and TN Logistics, out of which three were with TN Coldrooms and two were with the plaintiff (TN Logistics). The two storage contracts were exclusively with TN Coldrooms.

[8] In point of time, the various contracts were as follows:

Contract	Period	Type of Contract	Documents
1st Contract	December 2004	TN Coldroom for storage	CB Vol 3 page 459
2nd Contract	April 2005	TN Coldroom for transportation	CB Vol 3 page 415
3rd Contract	November 2005	TN Coldrooms for transportation	CB Vol 3 page 421
4th Contract	November 2005	TN Coldrooms for storage	CB Vol 3 page 462
5th Contract	March 2006	TN Coldrooms for transportation	CB Vol 3 page 423
6th Contract	October 2007	TN Logistics for transportation	CB Vol 3 page 425
7th Contract	November 2007	TN Logistics for transportation	CB Vol 3 page 427

[9] It is to be noted that all the invoices for services were issued in the name of the plaintiff (TN Logistics) regardless of the entity with whom the contract was entered into or the service provider.

[10] Although the issue of whether the plaintiff (TN Logistics) was the right entity to sue for recovery was raised and dealt with by the learned JC, learned counsel for the defendant submitted that in the appeal before us the defendant would not be pursuing this issue. Rather the defendant does not dispute the claim on the invoices except in respect of those invoices which are time-barred.

Submission By The Defendant

[11] It was submitted by the defendant that they are disputing the first claim, ie, the invoice claim on the basis that, part of it is time barred.

[12] The defendant disputed part of the invoice which are the pre October 2007 invoices which amounted to RM274,540. The balance RM1,409,310.38 has been paid by the defendant together with the judgment sum which was ordered by the learned JC.

[13] The present suit was filed in October 2013. Hence it would follow that the claims on invoices before October 2007 would be caught by limitation. The defendant has specifically pleaded limitation at para 21 in its statement of defence which can be found at CB1 p. 126. There was no reply nor defence raised to this plea of limitation by the plaintiff (TN Logistics).

[14] The invoices are listed in the plaintiff's (TN Logistics) statement of accounts at pp. 60-86 of CB Vol 1. The defendant submitted that from the statement of accounts, the invoices at pp. 60-68 expiring in September 2007 to the value of RM274,540 (at p. 68) would be time-barred.

[15] On the second and third claim, ie, the loss of profits claim and the trucks claim for the loss of rental in the sums of RM1,555,675.14 and RM470,500 respectively, which was allowed by the learned JC, it was submitted by the defendant that there has been no analysis and judicial evaluation of the facts and the evidence in respect of these claims at all. Hence it warrants appellate intervention by this court.

Submission By The Plaintiff (TN Logistics)

[16] On the point of limitation, the plaintiff (TN Logistics) sought to rely on a cheque issued by the defendant dated 6 April 2009 (CB Vol 3 p. 468) which was payment to the plaintiff for certain transactions.

[17] The plaintiff (TN Logistics) submitted that such partial payments fall within the ambit of s. 26(2) of the Limitation Act 1953 which stipulates that a cause of action may freshly accrue at the time the debtor acknowledges the claim or when the debtor makes any payment in respect of the debt. Therefore, as the defendant had made these partial payments on 6 April 2009, which amount to an acknowledgement of the debt on the part of the defendant, the plaintiff's (TN Logistics) action which was filed on 4 October 2013 is well within the six year limitation period and thus is not time-barred.

[18] As for the second and third claim, the plaintiff (TN Logistics) submitted that, at the trial, DW1 agreed that when the plaintiff (TN Logistics) provided the services to the defendant, the relationship between the plaintiff (TN Logistics) and the defendant for the period between April 2005 and April 2009 was governed by the terms and conditions found in the contract (pp. 281-281 CB Vol 2).

[19] Clause 4.1 of the transportation/distribution contract stipulates that in order for the defendant to terminate the contract, the defendant must give six months advance notice (see p. 420 of CB Vol 3).

[20] It was submitted that the defendant failed to give the 6 months advance notice as stipulated. (See p. 501 CB Vol 3).

[21] PW2 had explained the reason for the six months notice and he was not challenged on this issue.

[22] The defendant was forewarned of the consequences of not giving the six months advance notice *vide* the plaintiff's letter dated 3 April 2009 (p. 778 appeal record Vol C-2).

[23] As a result, the plaintiff (TN Logistics) suffered loss. This was explained by PW2 and PW6.

Findings

Limitation Issue

[24] In rebutting the defence of limitation, the plaintiff (TN Logistics) sought to rely on s. 26(2) of the Limitation Act 1953, which provides that:

> 26(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment: …

[25] For this rebuttal the plaintiff (TN Logistics) relied on a cheque dated 6 April 2009 which was issued by the defendant (p. 468 of CB Vol 3) to the plaintiff allegedly for payment of certain transactions. This, according to the plaintiff (TN Logistics) amounted to part payment by the defendant, which is an acknowledgement of the debt which therefore rebuts the defence of limitation relied on by the defendant.

[26] We found that this rebuttal by the plaintiff (TN Logistics) on the defence of limitation is flawed for the following reasons:

[27] Firstly, the plaintiff (TN Logistics) did not plead the exception under s. 26(2) of the Limitation Act 1953 as regards of the alleged acknowledgement of the debt. It is a requirement to plead the fact of the acknowledgement of a debt in order to revive the cause of action, as demonstrated by the Privy Council case of *Manilal & Sons v. Mahadevan* [1986] 2 CLJ 2; [1986] CLJ (Rep) 26; [1986] 1 MLJ 357, at p. 31 (CLJ); p. 361 (MLJ) wherein was stated:

> … The appellants had not pleaded at any stage previously that Mr. Ratnavale, or his agents, had acknowledged the debt within the meaning of section 26 (2) of the 1953 Act nor was this point argued before the learned Judicial Commissioner … In *Oversea Chinese Banking Corporation Limited v. Philip Wee Kee Puan*, Lord Bridge of Harwich, delivering the judgment of the Board, quoted from the judgment of the Federal Court in the case of *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail*. After quoting from the learned Chief Justice, Lord Bridge said:
>
> > He went on to consider whether, in a case where limitation is relied on, an acknowledgement should be pleaded. He concluded, rightly in their Lordship's opinion, that it should.

[28] The rationale of pleading by the plaintiff (TN Logistics), of the fact of an acknowledgment of the debt is only too obvious. How would the defendant know what is the case that he has to meet if it is not pleaded by his opponent. This is the basic rule of pleading. (See the case of *Halsnad v. Mahabala Rao* AIR 1937 Madras 826).

[29] The plaintiff (TN Logistics) submitted that it has pleaded the acknowledgement of the debt in para. 21 of the amended statement of claim (p. 96 of CB1). However we found that para. 21 of the amended statement of claim does not amount to a plea of acknowledgement within the ambit of s. 26(2) of the Limitation Act 1953.

[30] Further, as an essential element of an acknowledgement of the debt, (as a defence to limitation), the acknowledgment must be unequivocal. There must be evidence of an acknowledgement by the defendant that they were indebted to the plaintiff (TN Logistics) and quantified in figures. Section 27 of the Limitation Act 1953 provides that:

> Formal provisions as to acknowledgments and part payments
>
> 27(1) Every such acknowledgment as is referred to in section 26 or in the proviso to section 16 of this Act shall be in writing and signed by the person making the acknowledgment.
>
> (2) Any such acknowledgment or payment as is referred to in section 26 or the proviso to section 16 of this Act may be made by the agent of the person by whom it is required to be made under that section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.

[31] The plaintiff (TN Logistics) failed to show any documentary evidence, where the language used by the defendant can amount to an unequivocal admission of a subsisting debt. In the Federal Court case of *Wee Tiang Teng v. Ong Chong Hooi & Anor* [1978] 1 LNS 234; [1978] 2 MLJ 54, it was held that:

> the letter in question was not sufficient acknowledgement. By it the defendants acknowledged that a claim had been made against them, they did not acknowledge that they were indebted to the plaintiff and even if it was an acknowledgment the debt acknowledged was not quantified in figures nor was it capable of ascertainment by calculation or by extrinsic evidence without further agreement of the parties. To take a demand out of the statute of limitation on the ground of acknowledgment, the language of the debtor must amount to an unequivocal admission of a subsisting debt, that is, subsisting at the time of its acknowledgement.

Compare this to the Federal Court case of *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207 where "there was a clear and unequivocal acknowledgement by the respondent that there was a subsisting debt of RM581,876.77 in the letter dated 15 September 2003. In the circumstances, the right of action of the appellant for the shortfall for the period prior to 26 October 1999 was deemed to have accrued on 15 September 2003. Hence, when the action was filed in 2005, limitation had not set in."

[32] Secondly, as a matter of evidence, the defendant did issue a cheque dated 6 April 2009 (p. 468 of CB Vol 3). However, that was all the evidence to it. No evidence was led by the plaintiff (TN Logistics) to show the purpose of the cheque payment. Neither was it shown for which invoice or which transaction the payment was for. In addition, there is nothing in the notes of proceedings to show that the plaintiff (TN Logistics) had referred to any of the defendant's witness, the cheque which was allegedly for part payment of the debt in question. The burden of proving such claim is on the plaintiff as it is the plaintiff (TN Logistics) who is relying on the exception to the plea of limitation to establish the rebuttal to the time-barred part of the claim.

[33] Hence, the acknowledgement of the debt exception raised by the plaintiff to the defence of limitation by the defendant is clearly unsustainable as the plaintiff (TN Logistics) failed to plead the fact of such exception and there is no evidence to show that the cheque payment by the defendant was towards any particular invoice/transaction. As such it failed to meet the test of an unequivocal acknowledgement of the debt.

[34] Therefore, the invoice claim of RM274,540 is clearly time barred and should be deducted from the total claim.

The Second And Third Claim

[35] From the grounds of judgment of the learned JC, the learned JC failed to address her mind to the second and the third claim. There has been no analysis on the facts and the law in relation to the second and the third claims by the learned JC. Nevertheless, both the claims were allowed.

[36] It has been established time and again that a claim for damages for loss has to be proven, in the absence of which, the claim falls. For a judge hearing the claim for damages for loss, it is incumbent upon that judge to evaluate the facts and the evidence before arriving at a decision as to whether to allow or dismiss such claims. In cases where there has been a lack or the absence of such judicial evaluation of the facts and evidence, and an award of damages has been made by the presiding judge, such an award is liable to be set aside. This was reiterated in the Federal Court case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (Tab 7) where it was held that:

> … a Judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention i.e that a decision arrived at, by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[37] Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 (Tab 8) at p. 617 stated in his judgment that:

> In effect the court, before it interferes with an award of damages, should be satisfied that the Judge had acted on the wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

[38] It was submitted by counsel for the plaintiff (TN Logistics) that when the learned JC allowed the claims as stated in para 35 of the grounds of judgment, she did not make it *in vacuo*. Counsel for the plaintiff submitted that the learned JC could not have "plucked those sums from thin air. The trial judge had looked at the evidence and clearly stated that the plaintiff has proven its case on a balance of probabilities …".

[39] However, perusing through the grounds of the learned JC, a major part of the learned JC's grounds was focused on the issue of the privity of contract (pp. 1-22 of the grounds) between the parties. It was only at p. 22 of the

judgment that the learned JC addressed her mind to the limitation issue. Then at p. 23 the learned JC concluded the judgment by allowing all the three claims of the plaintiff (TN Logistics). Nothing was stated in the grounds of any facts or evidence to support her final conclusion.

[40] Hence, we are unable to determine whether the learned JC had acted on the correct principle of law as there has been no judicial evaluation at all of the facts and the law as far as the second and the third claims are concerned, when she decided to award the same to the plaintiff (TN Logistics). We are unable to ascertain the basis for the JC's consideration in allowing both of the claims. Therefore, there was no basis for her findings that the plaintiff (TN Logistics) has successfully proven its case on a balance of probabilities.

[41] On this ground alone, the second and the third claims remain unsubstantiated and hence ought to be set aside.

[42] Further, going on the merits of the second claim, it is premised on the fact that the defendant had wrongly terminated the contract between them by giving short notice. The claim is based on the second contract, which is one of the seven contracts between the defendant and the plaintiff (TN Logistics) and TN Coldrooms. It was not an open-ended contract as were the other six contracts which came into effect whenever the defendant ordered for the transportation or storage services to be rendered as the case may be. Further the second contract was for a fixed term of two years plus another two years. The duration of the contract was from April 2005 until April 2009.

[43] It is pertinent to note cl. 4 of the second contract which stipulates that:

> 4.0 Condition of Contract
>
> 4.1 the term of contract is for a period of two (2) years plus two (2) years option.
>
> Either party reserve the right to terminate this agreement by giving six (6) months in advance notice.

[44] The plaintiff (TN Logistics) alleged that the defendant failed to issue the six months' notice period as was required under the contract. The plaintiff (TN Logistics) pleaded and claimed that due to the failure on the part of the defendant to issue the six months' notice of termination, it incurred loss of profits on the basis of average sales per month of RM321,421.62 x 6 = RM1,928,529.72. (paras 28-29 of the statement of claim at CB Vol 1 pp. 101-102)

[45] It is to be noted that the second contract would expire by 22 April 2009. The defendant issued the notice of termination on 18 March 2009 to terminate the contract with effect from 6 April 2009. (see CB Vol 3 p. 501).

[46] It would appear that the date of the notice of termination of 18 March 2009 is about a month before the contract expired (22 April 2009). Hence it was legally impossible for the defendant to give the requisite six months' notice to the plaintiff (TN Logistics).

[47] Therefore the claim for damages by the plaintiff (TN Logistics), on the basis of the failure by defendant to give the six months' notice before termination, is clearly unsustainable, as the contract itself expired before the six month notice of termination could take effect.

[48] On another note, the basis of the claim by the plaintiff (TN Logistics) for damages for loss of profits is based on an average of sales multiplied by six months. The plaintiff (TN Logistics) is relying on the average gross sum of the invoice value. This cannot be an accurate figure as overhead costs such as petrol, the costs of hiring of drivers, operation costs and maintenance has to be factored in, to arrive at a net figure. Only then can a realistic profit figure be arrived at. To allow such a manner of calculation as adduced by the plaintiff (TN Logistics) would be to allow the plaintiff (TN Logistics) to claim for more than what it was entitled to, which is plainly wrong. The Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177 had occasion to deal with this point when it held that:

> However, we do not approve of the appellant's method of calculation for the loss of profits …This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on "commissions", that is to say receipts, is very different from a calculation based on "profits'. To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonable incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved.

[49] It is also to be observed that in making its claim for loss of profits, the plaintiff (TN Logistics) had produced a sheet of paper (See CB Vol 3 p. 503) known as "Lay Hong Billing summary" in the sum of RM1,555,675.14. This sheet of paper is unsigned. There were no primary documents or audited accounts produced by the plaintiff (TN Logistics) to prove the facts and the amount of the stated sum as loss of profits. Nevertheless, this was accepted by the learned JC as adequate proof of damages for the claim in loss of profits.

Edgar Joseph J (as he then was) in his judgment in *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360 which has since been adopted by the Court of Appeal and Federal Court observed that this is not the appropriate method in proving of damages when he said the following at pp. 366-369:

> I now turn to consider the crucial question: have the plaintiffs proved their claim for damages as alleged or at all? With regard to this part of the case, I would preface what I have to say by referring to certain well-established principles.

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages.

[50] In *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd (supra),* the chartered accountant who was called as a witness to prove the fact of damages, produced a sheet of calculations, P76 which was to show the estimated losses suffered by the plaintiffs therein due to the non delivery by the defendant of the goods. This method of calculation without any independent evidence was not approved by the courts as enunciated by Lord Goddard in *Bonham-Carter v. Hyde Park Hotel* [1948] WN 89:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying. "This is what I have lost, I ask you go give me these damages". They have to prove it.

[51] This method of calculation by using a sheet of paper consisting of summaries of billings without more has been repeatedly rejected by our courts. (See *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229: *Wasal Construction Sdn Bhd v. Boh Huat Chan Timber Products Sdn Bhd* [2013] 1 LNS 1269; [2014] 4 MLJ 294).

[52] The Supreme Court case of *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 established the rule of evidence that "when documentary evidence is tendered, primary evidence of the said document must be adduced except in cases under s. 65 of the Evidence Act 1950.

[53] PW2 in his evidence admitted that the "Lay Hong Billing Summary" from January 2008-March 2009 (p. 503 CB 3) was produced as proof of total sum of RM1,555,675.14 and that he was not the maker of such summary.

[54] Balance sheets or summary of billings do not by themselves prove the facts stated therein. It has to be proven like any other fact, be it affidavit or otherwise. The facts as stated in the summary of billings are mere statements and it cannot be taken as proving that the statements are correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount which is being claimed. In our present case, no evidence of the basis of the summary of the billings was adduced.

[55] In the upshot, in proving damages, real or factual evidence must be adduced as opposed to mere summaries or general estimations and conclusions before a party can succeed in its claim.

[56] The learned JC in our present case in her grounds did not give any indication as to how she had arrived at the result when she allowed the second claim of the plaintiff (TN Logistics). Therefore, the learned JC had come to an erroneous finding on the loss of profits claim. Thomson CJ made

the following observation in the case of *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56; [1961] MLJ 17 (CA), where the Court of Appeal dismissed the respondent's counterclaim of damages due to lack of proof:

> As regards the claim , the trial Judge did not make any finding of fact beyond saying that he believed the respondent's evidence and he did not believe the evidence of the appellant. He accordingly gave judgment in favour of the respondent for RM 59, 262.92. He has, however, given no indication as to how he arrived at this result.

[57] With respect to the third claim ie, the trucks claim for loss of rental in the sum of RM470,500, it was stated that the trucks were not in use for the period causing the loss allegedly suffered by the plaintiff (TN Logistics).

[58] The claim by the plaintiff (TN Logistics) against the defendant in this respect is set out at para. 17 of the statement of claim whereby, pursuant to a letter by the plaintiff (TN Logistics) to the defendant, the plaintiff (TN Logistics) agreed to purchase and the defendant agreed to sell five delivery trucks on terms set out therein. The terms, as set out, required the plaintiff (TN Logistics) to service the outstanding hire purchase payments on the trucks due to the defendant.

[59] It was one of the agreed terms that the defendant was to transfer ownership of the trucks to the plaintiff (TN Logistics) upon full settlement of the loan to the bank. The instalment payments were to commence on May 2005. The road tax and insurance to commence on May 2005 and the plaintiff (TN Logistics) was to pay the defendant the fees for inspection, renewal of road tax and insurance.

[60] The plaintiff alleged that, as of 29 November 2007, the defendant had unilaterally contra (set off) RM7,044.68 from the amount due to the plaintiff (TN Logistics) (RM448,751.68). RM7,044.68 was for the road tax, insurance and fees for inspection of the trucks.

[61] After the defendant had set off the full purchase price of the trucks in the amount of RM441,707, the defendant was to transfer the trucks to the plaintiff (TN Logistics) as stated in para. 20 of the statement of claim.

[62] It was alleged by the plaintiff (TN Logistics) that due to the failure of the defendant to make payments for road tax, insurance and fees for inspection, the plaintiff (TN Logistics) was unable to use the trucks until the date when the ownership of the trucks were transferred to the plaintiff (TN Logistics). Hence the total amount of loss which the plaintiff (TN Logistics) claimed as total loss of profits is in the amount of RM470,500.

[63] From the evidence, the full settlement price of the balance purchase price of the trucks was effected in April 2009 (See CB 4 p. 604). After settlement of the balance of the purchase price, the defendant had delivered the following documents to the plaintiff (TN Logistics):

(i) JPJ K8;

(ii) TM-AB;

(iii) Surat Pelepasan Tanggungan "Lampiran A1";

(iv) JPJ K 3-2 copies;

(v) Original release letter from the financier.

[64] There was evidence of acknowledgement of these documents by the plaintiff (TN Logistics) which are as follows:

(i) The acknowledgement letter dated 24 September 2009 for Truck BHH 6341 and BHH 6882 (CB 4 - p. 605);

(ii) The acknowledgment letter dated 19 August 2009 for truck BHY 776 (CB 4 - p. 6213);

(iii) The acknowledgement letter dated 11 September 2009 for Truck WMA 5719 (CB 4 - p. 625).

[65] For truck BGB 5642, all the documents were given to the plaintiff (TN Logistics) in 2005 (See CB3 p. 383 and Q and A No. 4, 5 and 6 of Foo Nguk Pow, DW3, the Assistant Manager of the defendant)

[66] Miss Foo Nyuk Pow (DW 3) further gave evidence that the original registration card and other relevant documents were given to the plaintiff (TN Logistics) back in 2005. However, the plaintiff (TN Logistics) did not proceed to effect the transfer of ownership of the trucks.

[67] There was also the evidence of the emails between Miss Foo Nyuk Pow (DW 3) for the defendant to Sheena Ngo for the plaintiff (TN Logistics) (pp. 612-614 of CB4).

[68] From the evidence, the registration cards for trucks WMA 5719, BHH 6341, BHH 6882 and BHY 776 were given by the defendant on 18 February 2008 to the plaintiff (TN Logistics), 14 months before the settlement of the balance purchase price. (See CB4 - p. 621). Therefore the evidence by the plaintiff (TN Logistics) which can be found at pp. 360-366 of CB2 to the effect that, only registration cards for the five trucks were given without other documents, was not true.

[69] PW7, Tan Boon Hian, general manager of the plaintiff (TN Logistics), in his evidence at pp. 361-367 of CB2 said that the document PG 11A was delivered late on 30 November 2011. However, he agreed during cross-examination that PG 11A was not in the list of JPJ checklist and therefore it is not a requirement for transfer to take effect, although earlier in his examination-in-chief he said that it was a requirement (See CB2 pp. 359-360).

[70] PW7 also said that all the documents for the five trucks have been delivered to the plaintiff (TN Logistics) (pp. 266-269 of CB2).

[71] PW7 did request for additional documents *via* email dated 5 January 2010 (pp. 270-271 CB2) which are Form 9, Form 49, IC of Directors, Board resolutions and PG 11A, JPJ K3, bank release letter. However, these

documents which were requested, were given to the plaintiff (TN Logistics) earlier, in September 2009 (see p. 271 of CB2) and had been duly acknowledged by the plaintiff's (TN Logistics) representative. The Board resolution was given 13 days after the plaintiff's (TN Logistics) request for the additional documents dated 5 January 2010 was made.

[72] The evidence further shows that, after receipt of the Board resolution in 18 January 2010 by the plaintiff (TN Logistics) ie, after a lapse of one year five months, the plaintiff (TN Logistics) again requested for additional documents *via* email dated 29 June 2011. This email was replied by the defendant's manager, Alex Ong, *via* email dated 29 June 2011 stating that according to the defendant's records, all complete sets of documents together with the directors' resolutions were signed and collected by the representative of the plaintiff (TN Logistics).

[73] PW7 also said that the defendant had handed over possession of the five trucks to the plaintiff in May 2005. It was also agreed by PW7 in his evidence that the renewal of insurance and road tax for the trucks could be done even without the plaintiff (TN Logistics) being registered as the owner of the trucks. Therefore, the evidence from the plaintiff's (TN Logistics) own witness, negates the contention of the plaintiff (TN Logistics) that the trucks were not usable because of the non renewal of road tax.

[74] As to the calculation for the claim for loss of rental of the five trucks, what the plaintiff (TN Logistics) adduced in evidence was a mere projection. This was conceded to by PW3 in his evidence at pp. 233-234 at CB2. PW3 also agreed that there is no evidence before the court of any contract between the plaintiff (TN Logistics) and any third party for any of the five trucks, which had to be terminated because the five trucks were not in use.

[75] Hence based on the aforementioned, the plaintiff failed to prove that the five trucks were not usable or that it suffered any loss of rental because they were not usable.

[76] What is pertinent to note is that, the learned JC did not consider at all the abovesaid evidence from the witnesses before she concluded her findings. Clearly, the learned JC erred in allowing the claim for the trucks ie, the loss of rental, when she did not analyse at all the facts and the evidence in arriving at her decision.

[77] In his submission, the plaintiff's (TN Logistics) counsel urged the court to remit the case back to the High Court for recalculation of the damages. However, we are constrained not to make such an order because of the way the case was presented before the trial court. For the claim of the loss of profits, the plaintiff failed to adduce evidence of operating expenses. Further, what was adduced was a billing summary with no primary evidence of accounts books or invoices to support such billing summary, not to mention the fact that the maker of the billing summary was never called. This is not a case where all the evidence of the loss was adduced and there was a wrong calculation of the figures that was before the court. This is a case

where the basic evidence was insufficient for any calculation or formula to be devised in order to arrive at a figure where the loss can be quantified. To remit the case back to the trial court for reassessment would result in giving the plaintiff a second bite of the cherry, which would cause grave prejudice to the defendant. This was not a case of a mere erroneous method of calculation as in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177, (refer to para. 118 and 119 at p. 216 of the reported case). The plaintiff (TN Logistics) in our present case had every opportunity to adduce the primary evidence of the losses claimed at the trial and had failed to lead the necessary evidence. The plaintiff (TN Logistics) will have to live with the consequences of the manner it has conducted the case at trial. Hence we are unable to agree that the case be remitted back to the High Court for reassessment.

Conclusion

[78] Therefore, with respect to the first claim ie, the invoices claim, we agree with the submission of the defendant that it is time barred. Paragraph 21 of the amended statement of claim does not amount to a plea of acknowledgement within the ambit of s. 26(2) of the Limitation Act 1953.

[79] On the second claim, ie, the claim for loss of profits, the learned JC erred in failing to evaluate the facts and the evidence and to state the reasons for her findings. There is also no evidence to support the claim for loss of profits. Such evidence as was relied upon, by the plaintiff was wholly inadequate.

[80] On the third claim, ie, the claim of the loss of rental of the five trucks, from the grounds, firstly, the learned JC failed to give any adequate consideration and undertake an analysis of the facts and the evidence. Secondly, there was also no evidence of such loss as the road tax and the insurance could have been renewed and the trucks could have been utilised without the change of ownership effected.

[81] We therefore set aside the orders of the High Court, with a consequential order that a refund of RM2,656,426.61 be made to the defendant. Costs of RM20,000 to the defendant subject to payment of allocatur and deposit is refunded.